

PART X
SURVIVORS' CLAIMS

F. SECTION 411(c)(4)

Sections 410.414(b) and 410.454(b), 20 C.F.R. §§410.414(b), 410.454(b), of the regulations, implementing Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), provide a survivor with various methods of proving pneumoconiosis and grant certain presumptions of total disability due to pneumoconiosis at the time of death and death due to pneumoconiosis. If the survivor establishes that the miner worked for fifteen years or more of coal mine employment in the underground mines, or the equivalent thereof, see Part X.F. of the Desk Book, and that the miner suffered from a totally disabling chronic respiratory or pulmonary impairment prior to death, it is presumed that the miner was totally disabled due to pneumoconiosis at the time of death, 20 C.F.R. §§410.414(b), 718.305(a), or that his death was due to pneumoconiosis, 20 C.F.R. §§410.454(b), 718.305(a). The presumption may be rebutted only by establishing that the miner did not have pneumoconiosis or that his respiratory or pulmonary impairment did not arise out of, or in connection with, work in a coal mine. 20 C.F.R. §§410.414(b)(2), 410.454(b)(2), 718.305(a), (d).

It should be noted that the Section 411(c)(4) presumption was deleted by the Black Lung Benefits Amendments of 1981, and the presumption is, therefore, inapplicable to claims filed on or after January 1, 1982. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(e).

Sections 410.414 and 410.454 also contain a "many years" provision and an "other relevant evidence" provision, which are discussed in Parts VI.E. and VIII.C.4. of the Desk Book. Section 718.305 does not contain comparable provisions.

Section 718.305 contains provisions that clarify the use of lay testimony to establish the Section 411(c)(4) presumption. Section 718.305(a) states that, in the case of a *living* miner, a spouse's affidavit or testimony may not be used *by itself* to establish the applicability of the presumption. Section 718.305(b) provides that, in the case of a *deceased* miner where there is no medical or other relevant evidence, affidavits of persons having knowledge of the miner's condition shall be considered to be sufficient to establish the existence of a totally disabling respiratory or pulmonary impairment.

Section 718.305(c) provides that the determination of the existence of a totally disabling respiratory or pulmonary impairment shall be made in accordance with Section 718.204. The Board has held that, in a survivor's claim, where the medical evidence of

record affirmatively establishes "that no lung disease was present," claimant is precluded from establishing total disability with lay evidence under Section 413(b) of the Act, 30 U.S.C. §923(b), as implemented by 20 C.F.R. §718.204(c)(5). **Pekala v. Director, OWCP**, 13 BLR 1-1 (1989)[issue of the availability of Section 718.204(c)(5) where there is medical evidence of record that falls short of affirmatively establishing the absence of lung disease was not before the Board].

In a survivor's claim, rebuttal of the Section 718.305(a) presumption requires the party opposing entitlement to rebut both the presumptions of total disability due to pneumoconiosis and death due to pneumoconiosis. **Alexander v. Island Creek Coal Co.**, 12 BLR 1-44 (1988), *aff'd sub nom. Island Creek Coal Co. v. Alexander*, No. 88-3863 (6th Cir. Aug. 29, 1989)(unpub.); see also Part VIII.C. of the Desk Book for additional discussion and digests.

CASE LISTINGS

[claimant not entitled to Section 411(c)(4) presumption where miner died of heart attack, suffered from simple pneumoconiosis, but did not suffer from totally disabling chronic respiratory or pulmonary impairment prior to death] **Kincaid v. Eastern Associated Coal Co.**, 1 BLR 1-60 (1977).

[adjudicator properly inferred, based on hospital records, pulmonary function studies and claimant's testimony, that miner suffered totally disabling respiratory or pulmonary impairment prior to development of lung cancer] **Luketich v. Bethlehem Mines Corp.**, 2 BLR 1-393 (1979).

[Fourth Circuit held that evidence of severe breathing impairment caused by lung cancer may establish totally disabling respiratory or pulmonary impairment under Section 411(c)(4); not claimant's burden to demonstrate causal relationship between miner's cancer and coal mine work or pneumoconiosis but employer's burden to rebut, establishing miner did not have pneumoconiosis or that his disability did not arise out of coal mine employment] **Rose v. Clinchfield Coal Co.**, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980).

[if established that miner not partially disabled from usual coal mine work under Section 411(c)(5), he cannot be found to be *totally* disabled under Section 411(c)(4)] **Soulsby v. Consolidation Coal Co.**, 3 BLR 1-565 (1981).

[Ninth Circuit found lay testimony sufficient to establish disability in survivor's claim where no medical evidence relevant to existence or extent of respiratory disability] **Dobbins v. Schweiker**, 641 F.2d 1354, 3 BLR 2-9 (9th Cir. 1981).

[evidence attributing miner's disabling respiratory or pulmonary impairment to conditions other than pneumoconiosis is relevant only to determining whether Section 411(c)(4) presumption rebutted by a showing that impairment not caused by pneumoconiosis or did not arise out of coal mine employment] **Webb v. Beth-Elkhorn Corp.**, 4 BLR 1-77 (1981).

[adjudicator's finding that miner not totally disabled by respiratory impairment based on hospital records which show the miner had cancer, hypertension, and osteoarthritis, and death certificate which listed bladder cancer as the cause of death. Lay testimony that miner coughed and had breathing difficulties was not supported by medical evidence. **Yendall v. Director, OWCP**, 4 BLR 1-467 (1982).

[Board declined to address adjudicator's findings under Section 411(c)(4) because findings establish entitlement under Section 727.203] **Skewes v. Consolidation Coal Co.**, 6 BLR 1-834 (1984).

[adjudicator properly found Section 411(c)(4) invocation based on death certificate and autopsy report stating that miner died from bronchogenic cancer, claimant's testimony and physician's opinion that miner's impairments were of "moderate severity"] **Cantrell v. United States Steel Corp.**, 6 BLR 1-1003 (1984).

[adjudicator properly found no Section 411(c)(4) invocation where sole medical report of record was equivocal and lay testimony indicated that, while miner had symptoms of respiratory impairment, he performed usual coal mine work until day of death including overtime] **Bartlett v. Director, OWCP**, 7 BLR 1-726 (1985).

[remand for consideration of cumulative effect of all evidence in resolving issue of total respiratory disability under Section 411(c)(4) where adjudicator found medical reports established existence of respiratory or pulmonary impairment and lay evidence established respiratory impairment was totally disabling as no portion of evidence, by itself, sufficient to establish entitlement] **Burnett v. Director, OWCP**, 7 BLR 1-781 (1985).

[lay evidence, by itself, may be sufficient to establish total disability in survivor's case where no medical evidence relevant to existence or extent of respiratory disability] **Henderson v. Director, OWCP**, 7 BLR 1-866 (1985); **Woolwine v. Director, OWCP**, 6 BLR 1-1023 (1984).

[totally disabling chronic respiratory impairment caused by bronchogenic cancer sufficient to invoke Section 411(c)(4) presumption, but was *rebutted* by evidence that miner's cancer did not arise out of coal mine employment] **Pyle v. Allegheny River Mining Co.**, 2 BLR 1-1143 (1981)[**overruled** to the extent that it held that lung cancer is *always* chronic: **Hunter v. Director, OWCP**, 8 BLR 1-120 (1985), *aff'd*, 803 F.2d 800, 9 BLR 2-140 (4th Cir. 1986)].

DIGESTS

Where the administrative law judge only considered and rejected entitlement under 20 C.F.R. §727.203(a) and did not address the possibility of entitlement under Section 411(c)(4) of the Act in a survivor's case where he found more than fifteen years of coal mine employment established, the Sixth Circuit remanded the case to the administrative law judge, noting the weakness of the medical evidence but also that "there was other lay testimony concerning conditions which are at least symptomatic indications of black lung disease." **Freeman v. Director, OWCP**, 781 F.2d 79, 8 BLR 2-94 (6th Cir. 1986).

In an SSA black lung case, the Sixth Circuit held that lay evidence alone may be sufficient to support a finding of total disability due to pneumoconiosis. **Rapier v. Secretary of Health and Human Services**, 808 F.2d 456, 9 BLR 2-191 (6th Cir. 1986).

The Seventh Circuit held that under Section 413(b) of the Act, 30 U.S.C. §923(b), in the case of a deceased miner, affidavits must be considered where the other relevant evidence is insufficient to establish entitlement, and may suffice, in themselves, to establish entitlement where there is no other relevant evidence. **Dempsey v. Peabody Coal Co.**, 811 F.2d 1154, 9 BLR 2-226 (7th Cir. 1987).

The Board held that claimant was not entitled to the presumption under 20 C.F.R. §718.305 since her survivor's claim was filed on or after January 1, 1982. **Kubachka v. Windsor Power House Coal Co.**, 11 BLR 1-171 (1988).

The Third Circuit held that, in the absence of an autopsy, a death certificate may not be used to preclude invocation of the Section 718.305 presumption of a totally disabling respiratory or pulmonary impairment on the basis of lay testimony. **Hillibush v. U.S. Department of Labor**, 853 F.2d 197, 11 BLR 2-223 (3d Cir. 1988).

The Third Circuit indicated that, where medical and other relevant evidence is merely insufficient to establish the presumption under Section 718.305 in a survivor's claim, rather than providing a basis for an affirmative determination that no lung disease was present, claimant may rely on lay affidavits alone to establish invocation of the presumption. **Hillibush v. U.S. Department of Labor**, 853 F.2d 197, 11 BLR 2-223 (3d Cir. 1988).

The Board held that a diagnosis of cor pulmonale may be relevant in determining the cause of a miner's disability (*i.e.*, it may be indicative that the disability was caused by pneumoconiosis). **Christian v. Monsanto Corp.**, 12 BLR 1-56 (1988).

Lay evidence may not be used to establish the existence of a totally disabling respiratory or pulmonary impairment under Section 718.305 if the record contains other

medical evidence. ***Bury v. Director, OWCP***, 9 BLR 1-79 (1986); *but see* ***Pekala v. Director, OWCP***, 13 BLR 1-1 (1989).

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